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4                   UNITED STATES DISTRICT COURT  
5                   WESTERN DISTRICT OF WASHINGTON  
6                   AT TACOMA

7                   QUINTON P BROWN,

8                   Plaintiff,

9                   v.

10                  GARY WAKEMAN,

11                  Defendants.

12                  Case No. C18-5416-BHS-TLF

13                  ORDER GRANTING PLAINTIFF'S  
14                  MOTION FOR EXTENSION AND  
15                  RE-NOTING DEFENDANTS'  
16                  MOTION FOR SUMMARY  
17                  JUDGMENT

18                  Plaintiff is proceeding *pro se* and *in forma pauperis* in this 42 U.S.C. §1983 civil rights  
19                  action. Dkts. 4, 5. Plaintiff moves to "stay" consideration of defendants' motion for summary  
20                  judgment (Dkt. 31) under Federal Rule of Civil Procedure 56(d) to March 15, 2019, to allow him  
21                  to obtain additional evidence. Dkt. 38. Defendants oppose plaintiff's motion arguing an  
22                  extension is not appropriate under Fed. R. Civ. P. 56(d). Dkt. 40. Plaintiff filed a reply. Dkt. 41.

23                  Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, "the court shall grant  
24                  summary judgment if the movant shows that there is no genuine dispute as to any material fact  
25                  and the movant is entitled to judgment as a matter of law." However, Federal Rule of Civil  
1                  Procedure 56(d) "provides a device for litigants to avoid summary judgment when they have not  
2                  had sufficient time to develop affirmative evidence." *United States v. Kitsap Physicians Serv.*,  
3                  314 F.3d 995, 1000 (9th Cir. 2002). Under Rule 56(d), if the nonmoving party "shows by  
4                  affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its  
5                  opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain  
6                  affidavits or declarations; (3) consider the motion on the record before the court has received  
7                  all affidavits or declarations; or (4) instruct the parties to submit a joint stipulation or order  
8                  deferring the decision on the motion." *Id.* at 1000.

9                  ORDER GRANTING PLAINTIFF'S MOTION FOR  
10                  EXTENSION AND RE-NOTING DEFENDANTS' MOTION  
11                  FOR SUMMARY JUDGMENT - 1

1 affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” Fed. R.  
2 Civ. P. 56(d).

3 In order to prevail under Rule 56(d), the party opposing summary judgment must make  
4 ““(a) a timely application which (b) specifically identifies (c) relevant information, (d) where  
5 there is some basis for believing that the information sought actually exists.”” *Emp’rs Teamsters*  
6 *Local Nos. 175 & 505 Pension Trust Fund v. Clorox*, 353 F.3d 1125, 1129 (9th Cir. 2004)  
7 (quoting *VISA Int’l Serv. Ass’n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir.  
8 1986)).

9 Though the conduct of discovery is generally left to a district court’s discretion, summary  
10 judgment is disfavored where relevant evidence remains to be discovered, particularly in cases  
11 involving confined *pro se* plaintiffs. *Klingele v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988)  
12 [...] Thus, summary judgment in the face of requests for additional discovery is appropriate only  
13 where such discovery would be ‘fruitless’ with respect to the proof of a viable claim.” *Jones v.*  
14 *Blanas*, 393 F.3d 918, 930 (9th Cir. 2004). The Ninth Circuit has held a Rule 56(d) continuance  
15 “should be granted almost as a matter of course unless the non-moving party has not diligently  
16 pursued discovery of the evidence.” *Burlington N. Santa Fe R.R. Co. v. The Assiniboine & Sioux*  
17 *Tribes of the Fort Peck Reservation*, 323 F.3d 767, 773–74 (9th Cir. 2003) (internal quotation  
18 marks and citations omitted).

19 Plaintiff indicates he is in the process of obtaining a declaration from another inmate, a  
20 member of the Muslim group at Stafford Creek, which will establish the Muslim group had no  
21 outside sponsor but that members were permitted to continue to attend Jumu’ah services in the  
22 last four months of 2016. Dkt. 38, at 4-5. Plaintiff indicates that in order to obtain this  
23 declaration he must comply with Department of Corrections offender to offender correspondence  
24 procedures which takes approximately 30 days in order to obtain authorization from the

1 superintendents from each prison and send and receive correspondence. *Id.*, at 3. Accordingly,  
2 plaintiff requests the Court defer consideration of defendants' motion for summary judgment  
3 until March 15, 2019, and allow him to submit his response to the motion on March 11, 2019.  
4 *Id.*, at 9. Defendants oppose plaintiff's request on the grounds that the declaration he seeks is  
5 irrelevant to the determination of defendants' motion and will not be based on personal  
6 knowledge.

7 The Court cannot conclude that the additional evidence plaintiff seeks additional time to  
8 obtain would be fruitless with respect to the proof of a viable claim. Plaintiff's claims relate to an  
9 alleged pattern or practice of discrimination by prison officials toward Jewish inmates in denying  
10 them worship services while showing preferential treatment of Muslim and other non-Jewish  
11 religious and secular inmates in facilitating and accommodating their worship services. *See Dkt.*  
12 5, at 63. Although defendants contend the declaration in question here will be irrelevant, the  
13 Court notes that defendants have submitted evidence in support of their motion that “[u]nlike Mr.  
14 Brown's group, the Muslim inmates always had a contract chaplain for their services at SCCC.”  
15 Dkt. 31, at 6. Plaintiff contends the declaration he seeks to obtain would contradict defendants'  
16 evidence on this point. Dkt. 38. The Court cannot conclude at this point that such evidence  
17 would necessarily be irrelevant or immaterial to plaintiff's claim or to the determination of  
18 defendants' motion. The Court also declines to speculate on whether or not the declaration in  
19 question, which is not yet before the Court, will or will not be based on personal knowledge.

20 The Court notes that it appears plaintiff has pursued discovery diligently in this case and  
21 that the reason he is requesting a short extension is that, as a confined *pro se* plaintiff, he must  
22 comply with additional DOC policy requirements in order to obtain the evidence he seeks. Under  
23 the circumstances, the Court finds a short extension is appropriate to ensure all parties have the  
24 opportunity to be fully heard on defendants' motion.

1 Accordingly, the Court **GRANTS** plaintiff's motion (Dkt. 38) as follows:

- 2 1. Defendants' motion for summary judgment (Dkt. 31) is continued to **March 22,**  
3 **2019.**
- 4 2. Plaintiff's response to defendants' motion for summary judgment must be filed by  
5 **March 18, 2019.** Defendants' reply is due by **March 22, 2019.**
- 6 3. The Clerk is directed to re-note defendants' motion for summary judgment (Dkt. 31)  
7 for **March 22, 2019.**
- 8 4. The Clerk is directed to provide a copy of this order to plaintiff and counsel for  
9 defendants.

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11 Dated this 6th day of March, 2019.

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15 Theresa L. Fricke  
United States Magistrate Judge  
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